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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 988 129

ALL AMERICAN AIRWAYS, INC., ASSOCIATED AIR TRANSPORT, INC., BLATZ AIRLINES, INC., COASTAL CARGO, INC., MODERN AIR TRANSPORT INC., QUAKER CITY AIRWAYS, INC., UNITED STATES OVERSEAS AIRWAYS, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE,

Petitioners,

v.

UNITED AIR LINES, INC., EASTERN AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL., TRANS WORLD AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., NATIONAL AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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All American Airways *et al.*, petitioners, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on April 7, 1960.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been officially reported. It is appended to this petition, p. 7a. The opinions of the Civil Aeronautics Board have not yet been officially reported, but appear at pages 1100A, 1273A, and 1295A of the Record.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated and was entered on April 7, 1960. No motion for rehearing was filed. This petition is filed within 90 days from the date of the order of the court below. Jurisdiction is conferred on this court by 28 U.S.C. Section 1254(1) and by Section 1006(f) of the Federal Aviation Act of 1958, 72 Stat. 796, 40 U.S.C. Section 1486(f). Federal jurisdiction exists because the case involves the review of an order of the Civil Aeronautics Board.

QUESTIONS PRESENTED FOR REVIEW

The Civil Aeronautics Board [1] issued certificates of public convenience and necessity to 23 supplemental carriers to provide "supplemental air service." [2] The Court of Appeals set the certification aside. The questions are:

1. Section 401(d) of the Federal Aviation Act provides that "The Board shall issue a certificate of pub-

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[1] Sometimes herein called "the Board."

[2] "Supplemental" service is defined as the operation by an air carrier of any number of charter trips, but not more than ten individually-ticketed or way-billed flights between the same two points in any one month.

lic convenience and necessity authorizing the whole or any part of the transportation . . . if it finds . . . such transportation is required by the public convenience and necessity." Section 401(e) provides that each certificate "shall specify . . . the service to be rendered."

(a) When the Board finds that the public convenience and necessity require supplemental service, does the fourth sentence of Section 401(e) (which provides that no term or condition of a certificate shall restrict the right of an air carrier to add schedules) prevent the Civil Aeronautics Board from issuing a certificate for supplemental service? and,

(b) Does the first sentence of Section 401(e) absolutely require the Civil Aeronautics Board to name, by city name, the points to be served, or can the Board, as it did, issue a certificate for service between any point in one state and any point in any other state, and define the term "point" in general terms?

2. When the Civil Aeronautics Board finds a carrier to be fit and able to engage in supplemental air transportation, must the Board also make findings that the carrier is fit and able to provide the maximum service authorized by the certificate, or is the finding of ability to perform minimum service sufficient?

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act here involved are set forth in the Appendix, p. 1a, to this petition. In this petition, it is often referred to as the Act. The provisions of the Federal Aviation Act do not differ in pertinent part from the predecessor statute, the Civil Aeronautics Act of 1938.

STATEMENT OF THE CASE

This case involves the very existence of the supplemental air carriers. The Civil Aeronautics Board has found that these carriers, as a class "have provided useful and necessary service in meeting fluctuating demands for air transportation"; "represent a significant part of the nation's air transport system" and "have rendered invaluable service to the military, both in the Berlin and Korean Airlifts, as well as in domestic charter operations. The continued existence of their fleet is of real value in terms of the national defense." (R. 573A)

Air carriers may provide air transportation only under operating authority issued by the Civil Aeronautics Board. The Board can issue operating authority in the form of an exemption, or a certificate.

The petitioners and other supplemental carriers have been operating for some 15 years under general or special exemption orders issued by the Board. From time to time, various changes in the operating authority were made by the Board. On September 21, 1951, a major proceeding was undertaken to determine the place of supplemental carriers[3] in the air transport field. (R. 1A) That is this case.

After lengthy public hearings, the Board issued an interim opinion in 1955, directing the issuance of an individual exemption order[4] to each supplemental carrier.[5] The Board's order was appealed and the United

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[3] Then called "Large Irregular" or "Irregular Transport" carriers.

[4] Called a "Supplemental Air Carrier Interim Operating Authorization."

[5] The form of this individual exemption appears at page 827A of the Record.

States Court of Appeals held that (1) the Board had authority to issue exemptions, but (2) the findings were insufficient to show what circumstances "would make certification an undue burden" on the supplemental carriers so as to warrant the Board's use of the exemption power.[6]

In setting aside the exemptions granted to supplemental carriers, the Court of Appeals practically invited the Board to issue certificates to the supplemental carriers, saying, "Neither can we ascertain why the Board is of the opinion that the certification of these carriers is not in the public interest." Although the order of the Board was reversed, the issuance of the mandate was stayed, pending the conclusion of the case before the Board. Since 1955, the supplemental carriers have been operating under their individual exemptions (and, in overseas and foreign air transportation, under other exemption orders.) This operating authority will be set aside, if the Court of Appeals issues its mandate.

Further hearings in the Board's investigation were completed, and, on January 28, 1959, the Board decided that it would no longer use the exemption provisions of the Act to regulate supplemental carriers, but, instead, would authorize their continued operation by "Certificates of Public Convenience and Necessity for Supplemental Air Service."[7]

Certain regular route air carriers, the respondents here, filed petitions for review of the Board's order.

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[6] *American Airlines* v. *Civil Aeronautics Board*, 98 U.S. App. D.C. 348; 235 F.2d 845 (1956), cert. denied 353 U.S. 905 (1957).

[7] The form of such a certificate appears at page 1280A of the Record.

contending, in effect, that the Board improperly issued certificates and failed to apply appropriate standards to determine the fitness and ability of the supplemental carriers to which certificates were issued. The petitioners intervened in the case in support of the Board's order issuing them certificates.

The court below reversed the Board for two reasons. First, the court held, as a matter of statutory interpretation, that the Board does not have the legal power to issue certificates for supplemental air service. Second, the court held that the Act does not permit the Board to issue a certificate for supplemental service to a carrier already providing minimum service unless it finds the carrier to be qualified to provide maximum service. Circuit Judge Fahy dissented on this latter point.

In one aspect, this case is a facet of the battle between big business and small business. The regular route carriers believe that they should retain for themselves all individually-ticketed traffic simply because they were originally issued certificates under a grandfather clause. The supplemental carriers contend that the supplementals are entitled to continue to share in the traffic and business which they developed, and that they should now be certificated to continue to provide their service. The issue was resolved before the Board in favor of the supplemental carriers. The court below, however, interpreted the Federal Aviation Act to mean that certificates can be issued for only regular route and not for supplemental operations.

Petitioners now seek review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE FUTURE OF THE SUPPLEMENTAL AIR CARRIER INDUSTRY IS AT STAKE.

The supplemental air carriers and the Civil Aeronautics Board are in a quandary. For nine years, the supplemental carriers have been trying to attain a recognized and definite status. When the Board decided to issue individual exemptions to the supplemental carriers, the Court of Appeals set the exemptions aside. Finally, after protracted hearings, the Board decided to issue certificates to the carriers. Then the Court of Appeals set the certificates aside. The sweeping effect of this decision is no better shown than in the statement of the Chairman of the Civil Aeronautics Board to the Congress:

> "It therefore appears that, to put it very moderately, there is at least grave doubt as to whether the carriers can be continued in anything resembling their present posture under either certificated or exemption authority."[8]

There are 25 supplemental carriers, with total revenues of $51 million in 1959. These carriers, as the Board has found, represent a significant part of the nation's air transport system and "the continued existence of their fleet is of real value in terms of the national defense." (R. 573A)

The decision of the court below strikes a body blow to the whole policy of the Board to continue the healthy growth of the supplemental carriers. Indeed, the result of the two decisions of the court below is to set

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[8] Statement of Whitney Gillilland, Chairman of the Civil Aeronautics Board, before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, Relative to H.R. 7593, May 23, 1960.

aside all operating authority of the carriers, and to severely limit, if not prevent, the Board from developing an essential part of the air transport industry which is responsive to the public convenience and necessity.

Supplemental air carriers are an important part of the air transport industry. They perform charter and flexible service flights which other carriers cannot and do not provide. They need certificates in order to provide a stable basis for their businesses, to prove that they are in business, and to convince bankers and others that they will continue in business. When the whole future of an important segment of an industry is at stake, the public interest is sufficiently involved to warrant consideration of the case by this Court.

II. THE COURT OF APPEALS AND THE CIVIL AERONAUTICS BOARD HOLD CONFLICTING VIEWS ON THE PROPER INTERPRETATION OF IMPORTANT PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958.

The Civil Aeronautics Board interprets the Federal Aviation Act to authorize it to issue certificates for special types of services, including such restricted types as helicopter service, local air service, property only service, and supplemental air service. The court below has so interpreted the Act as to cast doubt on the validity of all certificates which the Board has issued for special services, not just the certificates for supplemental air service.

There are two types of service which comprise supplemental service. The first is individually-ticketed or way-billed flights, not in excess of ten per month between the same two places. The second is charter service between any points which the customer may direct.

The Board issued one certificate embodying both types of service.

A. The power to issue a certificate authorizing ten trips.

The lower court held that the Board could not issue a certificate authorizing ten trips per month between the same two places. Its holding is based on a literal reading of that part of the fourth sentence in Section 401(e) of the Act which reads that "[n]o term, condition or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules." But, the sentence does not stop there. The statutory provision is that "[n]o term, condition or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities *for performing the authorized transportation and service . . .*" (Emphasis added) As this Court held in *Crescent Express Lines* v. *United States*, 320 U.S. 401, the provision has application only in the context of the service specified. The Board has held, and we submit rightly, that a certificate for supplemental service does not conflict with the fourth sentence. The carrier may still schedule his ten trips as the demands of the public and the development of his supplemental business shall require.

The Board recently issued a certificate for helicopter service which expressly authorized the carrier "to engage in air transportation, utilizing rotary-wing aircraft."[9] If the court below is right, then the fourth sentence of Section 401(e) would invalidate the certificates for helicopter service, because the certificate

[9] *Los Angeles Airways Renewal Case*, Docket No. 8178, Order E-12832, July 28, 1958.

restricts the carrier's right to change equipment. Thus, not only is supplemental service directly involved here, but the power of the Board to issue certificates for various types of special services is questioned. If the decision of the court below is not changed, the Board will be in a straight-jacket and its power to issue certificates will be limited to regular route services, even though the public convenience and necessity require other types of services. This would be contrary to the purposes of the Federal Aviation Act, which is a promotional and developmental statute for all aviation, not just regular route carriers.

B. The power to issue a certificate without naming points by city name.

In certificating the supplemental service, the Board authorized the carriers to provide service "between any point in any state of the United States or in the District of Columbia, and any other point in any state of the United States or in the District of Columbia." It then carefully defined "point" as "a single airport or place where aircraft can be landed or taken off, including the area within a 50-mile radius of such airport or place" and, in the case of Alaska, defined the whole state of Alaska as a single point in order to prevent supplemental operations between any two places in Alaska.

The court below reversed the Board in this respect. The court below looked only at a part of the first sentence of Section 401(e) of the Act, which reads, "Each certificate . . . shall specify the terminal and intermediate points, if any, between which the carrier is authorized to engage in air transportation . . ." The Court of Appeals thought that the authorization in

the certificate was not a specification of points. It completely refused to answer the argument of the Board that this sentence was not intended to limit the Board's power to confer or to describe a grant of authority and simply requires that "a certificate must indicate specifically the service which it authorizes both in geographic and in functional terms." (R. 1129A-1130A)

The court below overturned a long-established administrative policy.[10] The thrust of this argument is that the Court of Appeals misconstrued the Act. Certainly, the Congress did not require the Board to name every airport in the country in order to issue a certificate for supplemental air service. As the Board said in its opinion, "However, it would be impracticable to compile and list literally thousands of points in these certificates, for the supplemental service found required is plainly not a route service and would involve the listing not only of those points now named in route certificates, but also points not heretofore certificated. To name all points, apart from the great number involved, would serve no useful purpose and would lead only to confusion. We do not believe that the Act

[10] The Board, in its opinion said, "The Board has on various occasions specified in certificates the points between which transportation was authorized by means other than the conventional listing of points by their proper names in a linear route. Thus, in the *Alaska Air Transportation Investigation*, the Board certificated a number of carriers to provide air transportation between all points within delineated areas; e.g., 'all points within the First Judicial Division of the Territory of Alaska.' A decade later, similar certificate authority to provide service between 'all points' within defined areas was issued several carriers in the *Alaska Route Modification Case*. And in the *Reopened Samoan Airlines Case*, the Board granted certificate authority for service 'between any points not in excess of 1700 statute miles from Tafuna Airport, American Samoa.'" (footnotes omitted)

compels us to manufacture such difficulties in certificating supplemental air service." (R. 1131A)

It would seem to be clear that the Board is right and that the court below reads the statute in a manner not intended by the Congress.

The provision that "each certificate . . . shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered" is neither so clear nor unambiguous as to leave no room for construction as to its meaning.[11] The lower court plainly erred in its holding that what it deemed to be the "plain statutory terms" must be given their literal application "unless the inadvertent result of plain wording is absurd when applied to certain facts." Rather, "[e]ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose rather than the literal words." *U. S. v. Amer. Trucking Assn's*, 310 U.S. 534, 543. In "expounding a statute," the Court "must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285. In the light of the over-all statutory provisions and purposes of the Federal Aviation Act, the Board's construction of its powers seems to be wholly in keeping

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[11] The manner of specification is not enunciated, and the "if any" provision in relation to specification of points could equally apply to both intermediate and terminal points. *See Porto Rico Ry. Co. v. Mor*, 253 U.S. 345, 348; *United States v. Standard Brewery*, 251 U.S. 210, 218.

with the Act and the one most consonant with the statutory pattern and objectives.

The Act clearly contemplates not only the regulation of an existing transportation pattern but also "the encouragement and development of an air transportation system properly adapted to the present and future needs of . . . commerce . . . and of the national defense." The statutory purposes are defeated by a construction of the statute which freezes the development of an air transportation system to regular route services, and prevents the development of supplemental and special services. Such a highly developmental statute as the Federal Aviation Act was not designed merely to maintain the *status quo* as it existed twenty years ago.

It is submitted that the statute, in the light of the legislative history, shows that certificates for supplemental services were to be issued, as soon as the Board decided the public interest required such action. One of the chief draftsmen of the bill which became the Civil Aeronautics Act explained the purposes of the exemption provision (Section 416(b)) under which the supplemental carriers have heretofore operated, as follows:

> "Mr. Fagg. The definition of the term 'air carrier' given is so broad that it would include both carriers on scheduled and carriers not on scheduled routes, and we had two alternatives, one making this whole act apply to scheduled air-line operations and leaving out any regulatory provisions whatsoever for carriers not on schedule or including a broad definition and then caring for the immediate circumstances by allowing exemptions.
>
> "Now obviously, while we might follow the provisions of the Motor Carrier Act with regard to contract carriers and that sort of thing and get

> down to the point where a certificate of convenience might even be issued to charter operators or those not on schedule, we thought that at the present time there was no need for that, and as a matter of fact it probably would work undue hardship both on the Authority representing the Government and on the carrier. Therefore this provision has been put in to exempt from any requirement of a certificate of convenience of that type of carrier until it is found to be in the public interest."[12]

In furtherance of this purpose, Section 416(b) provides for exemption from the provisions of the Act, including the certificate requirement, if the Board finds that the provision in question constitutes an "undue burden . . . and is not in the public interest." If the Board cannot so find, the certification requirement applies to the common carriage by air involved, and certification is clearly indicated if the service is in the public convenience and necessity. That was the view held by the Court of Appeals when the case was before it the first time (*American Airlines* v. *Civil Aeronautics Board*, 235 F. 2d 845), and it is no less valid now.

The fundamental issue here presented is one which should be resolved by this Court.

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[12] Hearings before the House Interstate and Foreign Commerce Committee on H.R. 9738, 75th Cong., 3d Sess., 420-421 (1938). See, also, Cong. Rec. 6726; Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess., pp. 3-4. The bill was drafted by an "Interdepartmental Committee" composed of representatives of Government departments, and Mr. Fagg, one of the draftsmen, was Director of the Bureau of Air Commerce, the then safety regulatory agency.

C. The tests of fitness and ability.

An equally important divergence of opinion is found in the qualification issue of this case. And, here, Circuit Judge Fahy disagreed with the two other judges. The court below did not look at the situation as being one for the expert judgment of the Board, but, instead, substituted its own judgment. The substantiality of this argument can be made clear by a brief reference to the facts. The supplemental carriers have been operating for many years, with the same operating authority to provide service as they would have under their certificates. The Board simply changed their licenses from exemptions to certificates. The court said that in so doing, the Board had not only to reassess the ability of the carriers, which the Board did, but also the Board must determine if each carrier was qualified to provide the maximum service authorized. The Board, on the other hand, interpreted the statute to mean that if a carrier were qualified to provide and had been providing supplemental service, then a certificate could be issued. The court below was unfamiliar with the living practices of the industry.

It is true that a few supplemental carriers which had been performing small or specialized service were found qualified for full supplemental authority. But, the certificate of public convenience and necessity is only an economic operating authority. Before a carrier can utilize different equipment in its service, it must first obtain the proper safety authority from the Administrator of the Federal Aviation Agency. The Board was aware of this, but the court below apparently was not.

The supplemental carrier can be described as the "tramp steamer of the air." Supplemental carriers

provide service in many markets on a seasonal basis, and in others on a contract basis for the national military establishment.

Some of the supplemental carriers in the past have concentrated on charter service, others on individually-ticketed service; some are predominantly cargo carriers, others, predominantely passenger carriers. All of those which received certificates were operating, or had operated, large transport aircraft. Some will continue to be large operators while others will be smaller. They are taken together, as a class, because of their flexibility of operations and their ability to shift operations from place to place, and because the public demand for their services is similarly fluctuating and unpredictable.

There was no showing, and there could not have been, that a carrier able to operate transport aircraft between Miami and New York for example, lacked the ability to operate between New York and San Francisco. See *Civil Aero. Bd.* v. *State Airlines, Inc.*, 338 U.S. 572, 581.

To require a carrier to prove anew its fitness and ability every time it changes its area of operations would be an intolerable and unreasonable burden on both the carrier and the Board. Yet, that is what the court below would require, and that is apparently why Circuit Judge Fahy dissented. The problem of interpreting the meaning of the statute in the field of supplemental service should not be resolved by a two-to-one decision in the Court of Appeals; this court should speak in order that the industry and the regulatory agency will be advised of the proper meaning.

III. THE COURT OF APPEALS HAS DECIDED THE CASE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A principal question in this case is the power of the Board to "specify the service to be rendered" in the light of the other provisions of the Act.

The leading case on this subject is *Crescent Express Lines* v. *United States*, 320 U.S. 401 (1943). There, this Court upheld the right of the Interstate Commerce Commission to issue a certificate for the transportation of not more than six passengers in any one vehicle. It was argued that the proviso in Section 208(a) of the Motor Carrier Act (Appendix, p. 5a) prevented the Commission from limiting the number of passengers to be carried in one vehicle, because it was in effect a limitation on the right of the carrier to add to or change equipment.

The three-judge district court held that the condition confining the service to cars holding not more than six passengers was a proper description of the service to be rendered as provided by the statute. This Court affirmed, saying:

> "We are of the view that the power of the Commission to limit the certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act." (320 U.S. 409)

Further explanation of the difference between a provision inserted in a certificate to specify the service to be rendered and a condition restricting the carrier's right to add to schedules is found in *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947). There, this Court drew a distinction between the power of the Interstate Commerce Commission under the Water Carrier Act

and its power under the Motor Carrier Act. The Court held that the Water Carrier Act does not require the Commission to "specify the service to be rendered" and, therefore, the rationale of the *Crescent Express* decision does not apply to certificates issued to water carriers. On the other hand, the Federal Aviation Act in express terms does require the Board to "specify the service to be rendered," and, accordingly, the *Crescent Express* doctrine does apply in aeronautical cases. The statute does not preclude the Board from inserting descriptive provisions in a certificate so long as such provisions are designed to specify the service to be rendered.

The court below failed to follow the teachings of this Court. Instead, it read the Federal Aviation Act as being like the Water Carrier Act in its restrictions. If it had followed this Court's interpretation of the Motor Carrier Act, as it should have done, it would have reached a different result in the air transportation field.

CONCLUSION

Because the court below has decided an important question of Federal law which is probably in conflict with the decisions of this Court, has interpreted the Federal Aviation Act of 1958 in such a manner as to prevent the Civil Aeronautics Board from issuing certificates of public convenience and necessity for services which the public convenience and necessity require, and has construed the statutory terms in a manner which will retard the development of an adequate air

transportation system, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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June 6, 1960

APPENDIX

APPENDIX

Pertinent Statutes

28 U.S.C.A. Section 1254 (1). Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Federal Aviation Act of 1958:

Declaration of Policy: The Board

Sec. 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic com-

merce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Certificate of Public Convenience and Necessity

Certificate Required

Sec. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Issuance of Certificate

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

Terms and Conditions of Certificate

(e) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air

transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

Exemptions

Sec. 416. (b) (1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an

undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (k) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraph is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

Certification or Certiorari

Sec. 1006. (f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

Motor Carrier Act

Terms and Conditions of Certificate

Sec. 208. [August 9, 1935.] [49 U.S.C., § 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

On petitions for review of orders of the Civil Aeronautics Board.

Before: Prettyman, Chief Judge, and Wilbur K. Miller and Fahy, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record from the Civil Aeronautics Board, and were argued by counsel. On Consideration Hereof, it is ordered and adjudged by this court that the orders of certification embraced in order No. E 13436 of the Civil Aeronautics Board on review in these

cases are set aside and that the proceedings are remanded for further proceedings not inconsistent with the opinion of this court.

Per CHIEF JUDGE PRETTYMAN

Dated: April 7, 1960

Separate opinion of Circuit Judge Fahy concurring in the result and generally in the opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15025

UNITED AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15027

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15032

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15034

PETITIONERS

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE, UNITED STATES OVERSEAS AIRLINES, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15035

TRANS WORLD AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., UNITED STATES OVERSEAS AIRLINES, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE, MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15045

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., UNITED STATES OVERSEAS AIRLINES, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE, MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15047

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15050

NORTHWEST AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15051

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

On Petitions for Review of Orders of the Civil Aeronautics Board

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Decided April 7, 1960

Mr. Robert L. Stern, with whom *Mr. William M. Dickson* was on the brief for petitioner in No. 15025, argued for all petitioners. *Mr. James Francis Reilly* also entered an appearance for petitioner in No. 15025.

Mr. E. Smythe Gambrell was on the brief for petitioner in No. 15027.

Messrs. Robert C. Barnard and *John C. Pirie* were on the brief for petitioner in No. 15032.

Mr. J. D. Feeney, Jr., was on the brief for petitioner in No. 15034.

Mr. James K. Crimmins was on the brief for petitioner in No. 15035. *Mr. James P. Simpson* also entered an appearance for petitioner in No. 15035.

Messrs. Howard C. Westwood and *William H. Allen* were on the brief for petitioner in No. 15045. *Messrs. Gerry Levenberg* and *Alfred V. J. Prather* also entered appearances for petitioner in No. 15045.

Mr. R. S. Maurer was on the brief for petitioner in No. 15047. *Messrs. Joseph J. O'Connell, Jr., Robert Reed Gray* and *James W. Callison* also entered appearances for petitioner in No. 15047.

Mr. C. Edward Leasure was on the brief for petitioner in No. 15050.

Mr. Richard A. Fitzgerald was on the brief for petitioner in No. 15051. *Mr. Andrew T. A. MacDonald* also entered an appearance for petitioner in No. 15051.

Mr. O. D. Ozment, Associate General Counsel, Litigation and Research, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner*, Deputy General Counsel, Civil Aeronautics Board, *Mr. Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Mr. Richard A. Solomon*, Attorney, Department of Justice, were on the brief, for respondent.

Mr. Albert F. Beitel, who was on the brief for intervenor Modern Air Transport, Inc., and certain other intervenors, argued for all intervenors.

Mr. Dewitt T. Yates was on the brief for intervenor United States Overseas Airlines and also entered an appearance for intervenor Supplemental Air Carrier Conference in Nos. 15034, 15035, and 15045. *Mr. Henry F. Eaton* entered an appearance for intervenors United States Overseas Airlines and Supplemental Air Carrier Conference in Nos. 15034, 15035, and 15045.

Before PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER and FAHY, *Circuit Judges*.

PRETTYMAN, *Chief Judge:* This is another phase of the problem of the supplemental air carriers.[1] The Board decided to certificate in this service those carriers which qualified for certification under its views of the criteria for qualification. Accordingly it issued certificates to certain of our intervenors here (Order No. E-13436). Those certificates purported to authorize operation "[b]etween any point in any State of the United States or in the District of Columbia, and any other point in any State of the United States or in the District of Columbia, with respect to persons and property."

The authority to issue certificates is conferred on the Board by Section 401 of the Federal Aviation Act of 1958.[2] Paragraph (e) of that Section provides in part:

> "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; * * *."

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[1] Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950); American Airlines v. Civil Aeronautics Board, 98 U.S. App. D.C. 348, 235 F. 2d 845 (D.C.Cir. 1956).

[2] 72 STAT. 754, 49 U.S.C., § 1371 (1958).

It seems plain beyond possibility of debate that a blanket authorization to operate between any two points in the United States is not a specification of the terminal points and the intermediate points, if there be any intermediate stopping points, of the operation. The legislative history supports this clear reading.

The certificates issued here also contained a limitation of the operation to ten flights each calendar month in the same direction between the san. two points. Section 401(e) of the Act contains this provision: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules . . . ." Failure of these certificates to observe this prohibitive restriction seems clear.

The Board and the intervenors argue that supplemental air service is in the public interest and that the over-all statutory scheme and the legislative history indicate an intention on the part of the Congress to empower the Board to issue certificates when it finds certificates to be in the public interest. But these generalities of intent and history cannot strike from a statute peremptory, unambiguous directives. If the requirements of Section 401(e) interpose an insuperable obstacle to the full development of supplemental air service, which they may well do, the problem is for the Congress. The Board should present it there. The courts cannot rewrite plain statutory terms, unless the inadvertent result of plain wording is absurd when applied to certain facts.

Section 401(d)(1) of the Act provides that

> "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly . . . ."

The Board gave the same nationwide cargo and passenger authority to each of the applicants to which it issued

certificates. In many instances the prior operations of individual applicants had been small or specialized, and in many instances the financial resources, adequate for the types of operations theretofore conducted by the carriers, were obviously inadequate for operations of the scope authorized by the certificates.

The Board argues that it gave weight to "going-concern" status (which petitioners call the "renewal" aspect) and careful consideration to the carriers' financial position and managerial make-up. But we think some effect must be given the word "such" in the above-quoted part of Section 401(d)(1). The applicant must be found fit, willing and able to perform "such" transportation, obviously referring to the transportation authorized by the certificate. Since these certificates were nationwide in scope and broad in authority, the qualifications of the applicants for that sort and kind of operation is the statutory prescription. Within that general concept, going-concern status and financial position are important considerations. But they must be considered only in so far as they indicate qualifications for the operation authorized in the certificate. Those considerations in less expansive measure might well be the criteria for more limited certifications.

The Board says that, based upon experience with these carriers, it determined that authority for these supplemental operations need not, and should not, be parcelled out in limited segments of the over-all supplemental picture. The Board says it concluded that the certification of a number of carriers, left basically free to pick and choose for themselves the phases of the program in which they would operate, would best meet the needs of the public. But the Congress put into its statute clear requirements as to certificates, and those requirements for specified terminal points and intermediate points, if any, are counter to the sweeping pick-and-choose concept which

the Board says guided it. It may be that the supplemental air carrier problem had not fully developed when the original statute was enacted,[3] or if may be that Congress meant the pattern to be precisely as it delineated it, but in either event a scheme of certification different from the one Congress spelled out is a problem for the Congress.

We do not have before us in the present case exemption authority under Section 416 of the Act and so express no opinion on that matter.

The orders of certification embraced in Board Order No. E-13436 must be set aside and the proceedings remanded.

The petitions for review also include an order of the Board[4] which denied petitioners motions for reconsideration of the orders of the Board entered in 1955.[5] Those orders were set aside by this court in *American Airlines v. Civil Aeronautics Board*.[6] But the Board says its underlying findings of a public necessity for a supplemental air service were not disturbed by this court's opinion and decision, and remain available as a premise for its new order[7] granting the certificates. Petitioners say the statute requires a finding of public convenience and necessity for each grant of a certificate, *i.e.*, for each certificated carrier. They therefore say the Board is required to reopen its old orders on this issue. Since we hold that the certificates granted are not authorized, we do not reach the question of the sufficiency of the under-

[3] The predecessor statute, the Civil Aeronautics Act of 1938, did not differ in pertinent part from the current Act.

[4] Order No. E-13435.

[5] Orders Nos. E-9744 and E-9884.

[6] 98 U.S. App. D.C. 348, 235 F.2d 845 (1956).

[7] Order No. E-13436.

lying findings. Moreover we think it is not necessary that the Board reopen the old orders to supply a lack, if any there be, in whatever new orders the Board may issue. The sufficiency of the support of any such new orders must depend upon the nature and extent of the support upon which the Board then relies. That question will arise if such orders are entered and are attacked. We intimate no opinion upon that issue. We regard the problem posed by the challenge to Order No. E-13435 as not now before us, in view of our action in respect to the principal order under review, the order granting the certificates.[8]

Order No. E-13436 set aside and proceedings remanded.

FAHY, *Circuit Judge*, concurring in the result and generally in the opinion: I agree that the order of certification must be set aside and the case remanded. I also agree with the opinion of the court except that I think the Board had adequate basis in the record to find, in accordance with section 401(d)(1) of the Act, that the applicants were fit, willing and able to perform the transportation properly.

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[8] Order No. E-13436.